



**CWS LOGISTICS LIMITED, Applicant v UNITED FOOD AND COMMERCIAL WORKERS,
LOCAL 1400, Respondent**

LRB File No. 017-18 & 047-18; June 29, 2018

Chairperson, Susan C. Amrud, Q.C.; Members Aina Kagis and Ken Ahl

For the Applicant: Susan B. Barber, Q.C.

For the Respondent: Dawn McBride

Objection to Conduct of Vote – Employer objected to Board Agent declaring two ballots spoiled as they were not properly packaged in provided envelopes – Board dismissed application as Board Agent reasonably exercised his discretion to ensure secrecy of vote was not violated.

Objection to Conduct of Vote – Application filed two business days late – Executive Officer exercised discretion to allow application to be considered, given short delay and lack of prejudice to Union.

REASONS FOR DECISION

Background:

[1] **Susan C. Amrud, Q.C., Chairperson:** On January 23, 2018, the United Food and Commercial Workers Local 1400 (“Union”) filed an Application for Bargaining Rights with respect to the employees of CWS Logistics Limited (“Employer”)¹. The Reply filed by the Employer on February 2, 2018 indicated that it had “no comment”. The Board issued a Direction for Vote on January 25, 2018. The Report of Agent of the Board Respecting the Conduct of Vote and Counting of Ballots issued on February 16, 2018 stated that all six employees had voted, with the result indicating three votes for the Union, one vote against the Union and two

¹ LRB File No. 017-18.

spoiled ballots. On February 26, 2018, the Employer filed an Objection to Conduct of the Vote². This is the application that is the subject of these Reasons for Decision.

[2] The parties filed an Agreed Statement of Facts, as follows:

1. *The Union filed an application for bargaining rights with the Saskatchewan Labour Relations Board (the "Board") on January 23, 2018 in LRB file No. 017-18.*
2. *The Board issued a direction for vote amongst eligible employees of the Employer on January 25, 2018.*
3. *The vote was conducted by way of mail-in ballot amongst a group of six eligible employees of the Employer.*
4. *The Board agent's report is dated February 16, 2018. It notes the results of the vote as follows:*
 - *No. of eligible voters – 6*
 - *No. of the votes for Union – 3*
 - *No. of votes against Union – 1*
 - *No. of spoiled ballots – 2*
 - *No. of ballots cast – 6*
 - *No. of employees not voting – 0*
5. *A notice of objection to conduct of the vote was filed on behalf of the employer on February 23, 2018. The Union's reply was filed on February 27, 2018.*
6. *In a vote conducted by mail-in ballot there are three envelopes:*
 - (a) *A brown coin envelope in which the marked ballot is to be placed ("Envelope A");*
 - (b) *A second envelope upon which the employee/voter is identified and in which the brown coin envelope is to be placed ("Envelope B"); and*
 - (c) *A third envelope which has postage affixed and an address to the office of the board, in which the second envelope containing the coin envelope (and ballot therein) are placed ("Envelope C").*
7. *When envelopes arrive at the Board they are date stamped and collected in their respective files. When tabulation occurs only Envelope C is opened. All Envelope B's are then viewed by the scrutineers, acknowledged and placed together at one collection point*

² LRB File No. 047-18. The Written Submission of the Employer and the Agreed Statement of Facts state that the Objection was filed on Friday February 23, 2018; it was actually filed on Monday February 26, 2018. An unsigned copy was delivered to the Board on February 23, 2018.

8. *Once all Envelope B's having the name of the voter have been viewed and acknowledged they are opened and the Envelope A's within Envelope B, presumably containing the ballot, are then placed at another collection point.*
9. *The Envelope A's are mixed about to ensure confidentiality and are then opened and the ballots, if contained inside the brown coin envelopes, are viewed and considered.*
10. *In this matter six envelopes were received. Two Envelope C's received by the Board contained only the ballot, without either Envelope A or Envelope B inside. The yellow folded ballot was visible within the envelope.*
11. *The two ballots in question were advanced to the Board contrary to the voting instructions provided by the Board.*
12. *The two ballots in question were mailed to two eligible voters at the same address.*

[3] During the course of the hearing the parties indicated that the makeup of the workforce had changed since the vote was taken.

Argument on Behalf of the Parties:

[4] The Employer addressed four issues in its argument. First, the Objection to Conduct of the Vote was filed late. The Employer submitted that this would be an appropriate case for the Executive Officer to grant an extension for that filing, pursuant to subsection 6-112(3) of *The Saskatchewan Employment Act* ("Act") and subsections 27(1) and (2) and section 30 of *The Saskatchewan Employment (Labour Relations Board) Regulations* ("Regulations"). It argued that the Employer was not responsible for the delay (counsel error) and that the Union had not suffered any prejudice (because the Board had not yet issued an order regarding the application). In addition it noted that the delay was not inordinate or unreasonable, and that the extension was warranted so that the important issue of Board policy respecting spoiled ballots could be considered.

[5] Second, the Employer indicated its position was that it had standing to bring this application, based on the Board's decision in *United Food and Commercial Workers, Local 1400 v. Atco Structures and Logistics Ltd.*, 2015 CanLII 80541 (SK LRB) ("*Atco Structures*").

[6] Third, the Employer argued that the two ballots declared as spoiled should be counted or, alternatively, a new vote should be ordered. Since there were only six eligible voters, the two ballots that were considered spoiled are statistically significant and may have

been material to the outcome of the vote. The Employer was of the view that steps could have been taken by the Board Agent to ensure the confidentiality of the identity of the two voters who did not follow the instructions in the use of the envelopes provided. It noted that this circumstance was not listed in subsection 23(8) of the Regulations as a case where ballots shall be rejected. The Employer argued that if the ballots no longer exist or if the Board is of the view that the identity of any voter has been compromised, then a new vote should be held.

[7] Fourth, the Employer stated that the fact that the Employer did not have a scrutineer present has no bearing on the outcome of the application. Scrutineers have a reduced role when a mail-in ballot process is used.

[8] The Union submits that in the absence of an explanation for the delay and given the need to resolve certification applications in a timely manner, this is an appropriate case for the Executive Officer to exercise her discretion and declare the Employer's late application to be void.

[9] With respect to the decision of the Board Agent to declare the ballots spoiled, the Union also relied on *Atco Structures*, to argue that the Board should not interfere with the exercise of his discretion. The Union is of the view that the Board Agent exercised his discretion fairly, reasonably and in a manner that is consistent with the Act and the Regulations. The Union submits that the fact that the Employer did not raise an issue with the spoiled ballots until after the tabulation creates significant prejudice to the Union. It does not agree that the failure by two employees to follow the procedure set by the Board is a mere technicality. The Union argued that since the Board Agent deemed the ballots spoiled as not meeting the requirements of the mail-in procedure, he was not required to assess whether the ballots themselves may have been spoiled for some other reason.

[10] Both parties provided the Board with submissions that the Board reviewed and found helpful.

Relevant Statutory Provisions:

[11] The following provisions of the Act are relevant to this application:

Votes by secret ballot

6-22(1) All votes required pursuant to this Part or directed to be taken by the board must be by secret ballot.

Proceedings not invalidated by irregularities

6-112(3) *At any time and on any terms that the board considers just, the board may amend any defect or error in any proceedings, and all necessary amendments must be made for the purpose of determining the real question or issue raised by or depending on the proceedings.*

[12]

The following provisions of the Regulations are also relevant:

Conduct of votes

23(1) *In this section, "agent" means a person appointed pursuant to subsection (3).*

(2) *On the filing of an application respecting a matter for which the board is authorized or required to conduct a vote pursuant to the Act or these regulations, the board may:*

(a) *if the board considers it to be appropriate, direct that a vote of employees be conducted by secret ballot before the application is heard by the board; and*

(b) *provide any directions respecting the conduct of the vote that the board considers appropriate.*

(3) *The board may appoint as its agent the registrar or any other person who the board is satisfied is independent from the parties to the application to conduct a vote required or authorized by the Act.*

(4) *If the registrar is appointed by the board as its agent:*

(a) *the registrar may delegate to one or more other persons the exercise of any of his or her powers, or the fulfilling of any of his or her duties, as agent pursuant to this section and impose any terms and conditions on the delegation that the registrar considers appropriate; and*

(b) *the exercise of any powers or the fulfilling of any duties by a delegate mentioned in clause (a) is deemed to the exercise of those powers or the fulfilling of those duties by the registrar.*

(5) *An agent shall:*

(a) *act as the returning officer for the vote;*

(b) *comply with any directions given by the board respecting the vote;*

(c) *establish a list of employees who are eligible to vote;*

(d) *determine the form of the ballot to be used in the vote;*

(e) *determine whether the vote is to be conducted:*

(i) *at one or more polling places; or*

(ii) *using a mail-in balloting procedure;*

(f) *if the vote is to be conducted at one or more polling places, determine the place or places where the vote is to be conducted, together with the dates and hours for conducting the vote;*

(g) *if the vote is to be conducted using a mail-in balloting procedure, determine the date by which completed ballots must be returned to the returning officer;*

(h) *prepare a notice of vote in accordance with Form 20 (notice of vote) and issue directions to the employer respecting posting the notice of vote;*

(i) *appoint any persons whom the agents considers necessary as deputy returning officers and poll clerks; and*

(j) *if the vote is to be conducted at one or more polling places, invite the employer, any other person and the union named in the application to appoint one scrutineer for each polling place*

establish pursuant to clause (f) and allow those scrutineers to be present at the polling place during the hours the vote is conducted;
(k) if the vote is to be conducted using a mail-in balloting procedure, determine the place for counting of the ballots and invite the employer, any other person and the union named in the application to appoint one scrutineer to be present while the ballots are counted.

(6) An agent may issue any directions or instructions that the agent considers necessary respecting the conduct of the vote.

(7) No person shall:

(a) fail to comply with any directions or instructions given by an agent respecting the conduct of the vote; or

(b) if the vote is to be conducted at one or more polling places:

(i) interfere, or attempt to interfere, with a person who is voting;

(ii) attempt to obtain information at a polling place as to how a person has voted or is about to vote;

(iii) canvass or solicit votes within 20 metres of a polling place while the vote is being conducted; or

(iv) display, distribute or post a campaign sign, button or other similar material within 20 metres of a polling place while the vote is being conducted.

(8) In counting ballots, the agent:

(a) shall reject every ballot on which anything is written or marked that identifies the person voting or on which no vote is marked; and

(b) shall accept a ballot if the employee has marked the ballot in a manner that clearly indicates the choice of the employee and notwithstanding that the employee may have marked his or her vote out of, or partly out of, its proper space or with a mark other than an "X".

(9) On completion of the vote, the agent shall:

(a) if there is no direction of the board to the contrary and if there is no impediment to doing so, promptly count the ballots and complete Form 21 (Report of Agent of the Board Respecting the Conduct of Vote and Counting of Ballots); or

(b) if the agent does not count the ballots promptly after the vote, complete Form 22 (Report of Agent of the Board Respecting the Conduct of Vote).

(10) Immediately after completing Form 21 or 22 as required by subsection (9), the agent shall file a copy of the completed Form with the registrar and the registrar shall give a copy of the completed Form to an employer, to a union directly affected by the vote and, if the applicant who filed the application is not an employer or union, to the applicant.

(11) An employer, other person or union directly affected by the vote that intends to object to the conduct of the vote or the results from the counting of the ballots shall file an application in Form 23 (Objection to Conduct of the Vote) within three business days after the conduct of the vote or the counting of the ballots, as the case may be.

Authority of executive officer to vary time

27(1) On the request of any employer, other person, union or labour organization, the executive officer may, by order, set a further or other time than the time prescribed in these regulations for filing any Form or document or doing any other thing authorized or required by these regulations.

(2) *The executive officer may issue an order pursuant to subsection (1) whether or not the period at or within which a matter mentioned in that order ought to have been done has expired.*

(3) *The executive officer may impose any terms and conditions on an order issued pursuant to subsection (1) that the executive officer considers appropriate.*

(4) *Anything done at or within the time specified in an order pursuant to subsection (1) is as valid as if it had been done at or within the time fixed by or pursuant to these regulations.*

Non-compliance

30 Non-compliance with these regulations does not render any proceeding void unless the board directs otherwise.

Analysis:

[13] In *Application to Extend the time for filing of an Objection to the Conduct of a Vote*, LRB File No. 112-11, August 26, 2011 (unreported) the Executive Officer stated that the criteria outlined by the Court of Appeal in *Dutchak v. Dutchak*, [2009] SKCA 89 (CanLII), para 12 should be adopted as the standard by which the Executive Officer considers the exercise of the discretion to extend time limits pursuant to section 34 of the Regulations:

According to these decisions, in determining whether leave should be granted the applicant must persuade the Court that: (i) there is a reasonable explanation for the delay; (ii) he or she possessed a bona fide intention to appeal within the time limited for appeal; (iii) there is an arguable case to be made to a panel of the Court; and (iv) there will be no prejudice to the respondent, if leave is granted beyond what would be incurred in the usual appeal process. In any given case, one or more factors may be more important than another.

[14] After considering those criteria, the Executive Officer found that even though they had not all been satisfied, weighing them against the equitable principles of fairness and justice, the application was allowed: “Of principle importance is that no additional prejudice will be placed upon the respondent union given the short period of delay and the arguable case presented”³.

[15] The case now before the Board is very similar to *Application to Extend the time for filing of an Objection to the Conduct of a Vote* (unreported), noted above. Since this application was filed just two business days late, the Board had not yet issued an order regarding the Application for Bargaining Rights. The filing delay was attributable to an oversight by the Employer’s counsel. Allowing late filing will allow the issue in dispute between the parties to be determined on its merits. No comment was provided with respect to whether the Employer

³ The ballots were counted August 2, 2011 and the Objection to the Conduct of the Vote was filed August 16, 2011.

possessed a bona fide intention to appeal within the time limit. No prejudice to the Union has been proven.

[16] Therefore, as Executive Officer, I order, pursuant to section 27 of the Regulations, that the time for filing of the Objection to Conduct of the Vote is set at February 26, 2018, the day it was filed.

[17] The Union did not challenge the standing of the Employer to bring this application; therefore the Board did not consider that issue.

[18] The next issue is whether the Board should order that the spoiled ballots be counted, or that a new vote be taken. Either of these orders would require the Board to override the discretion exercised by the Board Agent in the counting of the ballots. Many cases have considered the issue of when it is appropriate for the Board to take that step.

[19] In *International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Crafts of United States, its Territories and Canada, Local 300 v. Inland Audio Visual Limited*, 2014 CanLII 5454 (SK LRB), the Board held, at paragraph 21:

For the same reason that our agents require discretion in establishing the parameters for representational votes depending on the circumstances of each particular workplace, the decisions they make deserve an element of deference. Our proceedings would become highly pedantic and pressure would mount for our agents to testify if this Board was to adopt an approach of routinely reviewing the minutia of each and every decision made by our agents in the conduct of representational votes. In our opinion, neither of these results are desirable. As we have noted, our agents are called upon to make difficult decisions and they often must do so within short time constraints. While this does not mean that errors will not occur, in our opinion, the lens through which the conduct of a representational vote must be viewed are whether or not the actions of our agents were reasonable in light of circumstances of the particular workplace and the Board's expectation of expediency in the conduct of those votes.

[20] It further stated, at paragraph 25:

As we noted in the Handy Special Event case, it is our agents who determine how, when and where representational votes will be conducted. We are satisfied that our agents have discretion to modify those parameters in extenuating circumstances. For example, if there is a delay in an employee receiving his/her package, it may be necessary to grant a modest extension to the deadline for returning that ballot. Similarly, a late ballot may be accepted if it is post marked prior to the prescribed deadline. All of these are extenuating circumstances and the concomitant modifications to the original parameters for the vote to cure

these types of defects are usually quite minor (a modest extension to the deadline). If extensions or special arrangements are made in response to extenuating circumstances, they must be modest and should, to the greatest extent possible, not delay the voting process. On the other hand, the established voting procedures should not be modified to aid employees who are merely careless as to their democratic rights (if they don't check their mail until after voting is over or if they forget to complete their ballots within the prescribed time). Furthermore, there is neither a guarantee, nor expectation, of perfect democracy in the conduct of representational votes. It is entirely possible that some employees may not be able to exercise their democratic rights no matter how much care is taken in planning the conduct of a representational vote.

[21] In *Atco Structures & Logistics Ltd. v. Unite Here, Local 47*, 2015 SKQB 275 (CanLII), Zarzeczny J made the following comment, at paragraph 25:

After observing that the Board's function is not to "second-guess" the Agent's determinations regarding how a vote should be conducted the Board then analysed the evidence given by each of the individual employees respecting their personal circumstances which they claimed resulted in them not voting. The Board concluded in respect of that evidence, in part, as follows at para. 50:

In all of the cases raised by employees, it was not the actions of the Board Agent that prevented them from casting a ballot, but rather it was their own actions...

[22] At paragraph 31, the Court held:

In its Decision, the Board recognized that so long as its Agent identified a vote process that was fair and permitted all eligible employees reasonable opportunity to vote it should not interfere with the exercise of the Agent's discretion. I have come to a similar conclusion upon this judicial review application. It is not for the court, any more than it is for the Board, to second-guess the discretion exercised by the Board's statutorily appointed Agent in the exercise of those discretions which the Act and the Regulations grant to the Agent. So long as that discretion is exercised fairly and reasonably and consistent with the statutory provisions and the object and intentions sought to be achieved by them, as the Board, in its Decision, found to be the case, the court should not and will not interfere.

[23] The Board is satisfied that the employees whose ballots were declared spoiled had a reasonable opportunity to vote. The Notice of Vote they received clearly indicated that the use of all three envelopes was mandatory:

This package includes a coloured ballot (Yellow Ballot). You may mark your ballot, fold it and it must be placed in the small envelope provided. Then the small envelope must be placed in the larger white envelope

containing your name and occupation, which is then to be placed into the third self addressed postage paid envelope for deposit into a postal box.

[24] For the two ballots in question, this direction was not followed. However, the direction provided guidance to the Board Agent in reaching a conclusion that the ballots should be declared spoiled.

[25] The Board is not prepared to second-guess or override the decision of the Board Agent in this matter. The voting process used by the Board Agent was fair and permitted all eligible employees reasonable opportunity to vote. The instructions to the employees respecting how to vote and how to package their ballots were clear. The instructions were properly followed with respect to four of the six ballots. It was not the action of the Board Agent, but the action of the persons who mailed in the other two ballots that caused those ballots to be spoiled. The fact that the Employer could, in the fullness of time, suggest an alternative process⁴ that the Board Agent could have followed to ensure the confidentiality of the two ballots in question does not make his decision unreasonable.

[26] The Board also notes that the objection to the vote was not raised with the Board Agent at the tabulation of the votes, or until after the Board Agent's Report was received by the parties. To tabulate the spoiled ballots now would violate the secrecy of these two ballots, as it would identify how these two employees voted. Given the requirement in section 6-22 of the Act that such votes be taken by secret ballot, it would be inappropriate for them to be counted now. As the makeup of the workforce has changed since the vote was taken, the Board declines to order a new vote. The employees whose votes were tabulated are entitled to have their wishes respected.

[27] The Board orders that the Application for Bargaining Rights is granted; an appropriate Order accompanies these Reasons.

⁴ Written Submission, para 37.

[28] This is a unanimous decision of the Board.

DATED at Regina, Saskatchewan, this **29th** day of **June, 2018**.

LABOUR RELATIONS BOARD

Susan C. Amrud, Q.C.
Chairperson